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FEDERAL COMMUNICATIONS COMMISSION
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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20054

In the Matter of

Implementation of Sections of
the Cable Television Consumer
Protection and Competition Act
of 1992

Rate Regulation

MM Docket 92-266

To: The Commission

COMMENTS OF
AMERICAN PUBLIC POWER ASSOCIATION

By: American Public Power Association
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January 27, 1993

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THE AMERICAN PUBLIC POWER ASSOCIATION'S
COMMENTS IN SUPPORT OF A BROAD INTERPRETATION
OF GEOGRAPHICALLY UNIFORM RATES

Pursuant to Sections 1.414 and 1.419 of the Commission's Rules and the Commission's Notice of Proposed Rule Making ("NPRM") adopted December 10, 1992 and released December 24, 1992, the American Public Power Association ("APPA") respectfully submits these comments to urge the Commission to adopt rules on cable television rate regulation that will require uniform rates within the broadest possible definition of a geographic area in furtherance of the objectives of the Cable Television Consumer Protection and Competition Act of 1992 (the "Act" or "1992 Cable Act").

I. NATURE OF APPA'S INTERESTS IN THIS MATTER

A. General Description of APPA and Its Members

APPA is the national service organization representing the interest of more than 2,000 locally-owned electric utility systems. Most of these public power systems are municipally-owned, but several are organized as public power districts and some are state-owned. APPA also serves the needs of its members that own and operate cable television systems or that are contemplating the creation of locally-owned and -operated cable television systems.

Many of APPA's members use fiber optics or co-axial cable for utility functions including electric load management, supervisory control and data acquisition ("SCADA") systems, and automated meter reading. Some APPA members also use such wiring for intra-governmental communications and educational communications. It is a natural extension for municipalities to utilize these cable networks in combination with cable home wiring to provide local cable television service. Additionally, APPA's member cities are typically "franchising authorities" as that term is used in the 1992 Cable Act.

Approximately two-thirds of the more than sixty (60) existing municipally-owned and -operated cable television systems in the country are located in communities that also own and operate their own electric utility systems. A recent survey by APPA indicates that many other APPA members would consider establishing competing cable television systems if the barriers to competition were eliminated. Rules providing for requiring uniform rate structure through the broadest possible geographic area are essential to eliminate one of the main barriers to such competition.

B. APPA's Position in Regard To The Definition Of A Geographic Area

In Section 3 of the Cable Television Consumer Protection and Competition Act of 1992 (P.L. 102-385), Congress amended the Communications Act of 1934 (47 U.S.C. 543) to establish a new Section 623 (d). This new section requires that all cable operators have a rate structure that is uniform throughout the geographic area in which cable service is provided over its system. In Paras. 114 and 115 of its NPRM, the Commission seeks comment on the meaning of the term "geographic area" as used in this context. Specifically, the Commission asks whether Congress intended this term to mean a franchise area, or whether the term refers to an area greater than a franchise, such as the contiguous area served by a cable system.

On behalf of its members which operate cable systems in head-to-head competition with other cable systems serving the same territory ("overbuilds") and those APPA members which are considering overbuilding cable systems, APPA urges the Commission to adopt the broadest possible definition of geographic area in implementing regulations requiring uniform rates throughout the

geographic area served by a cable system. APPA contends that the broadest possible interpretation of geographic area is necessary for the Commission to fulfill the intent of Congress and the policies set forth in the Act, for the reasons set forth below.

II. THE ACT DOES NOT LIMIT "GEOGRAPHIC AREA" TO AN INDIVIDUAL FRANCHISE AREA

In Para. 114 of the NPRM, the Commission notes that one possible interpretation is that Congress meant the phrase geographic area to refer to a franchise area served by a cable system operator. In the same paragraph, the Commission goes on to note that if Congress had intended to limit the meaning of geographic area to a franchise area, it could have used the less ambiguous term.

APPA concurs with the latter reasoning set forth in Para. 114. In fact, Congress was very precise in the terms it used throughout the balance of Section 3 of the Act. In Section 3 alone of the 1992 Act, Congress uses the terms franchise, franchise area, or franchise authority more than 40 times. In amending Section 623 of the Federal Communications Act of 1934, Congress used the terms franchise, franchise area, or franchise authority in Sections 623 (a), (b), (c), (e), (g), (j), and (l) to limit or delineate authority for establishing cable system rates. Obviously, Congress was not hesitant in any other provision of Section 3 of the 1992 Act to use these franchise-related terms or to limit application of ratemaking authority to franchise areas. It is not consistent with the remainder of Section 3, or indeed with the remainder of the 1992 Act, to assume that, in establishing the uniform rate structures requirement of Section 623 (d), Congress meant "franchise area" when it specifically used the broader term, "geographic area."

APPA concurs with the Commission's observation elsewhere in Para. 114 of the NPRM that limiting geographic area to the individual franchise areas served by a cable operator would be redundant with the authority for regulating rates within a franchise area. As the Commission noted, the new Section 623 (e) allows for the prohibition of discriminatory rates within a franchise area.

III. BROADEST POSSIBLE DEFINITION MUST BE GIVEN TO GEOGRAPHIC AREA TO PROMOTE COMPETITION WITHIN THE CABLE TELEVISION INDUSTRY

During the hearings, mark-up sessions and floor debate which led to the enactment of PL 102-385 Congress on numerous occasions expressed its concern about the lack of competition in the cable television industry. This concern was reflected in the Act's findings that:

- o Most consumers have no opportunity to choose between competing cable systems, resulting in undue market power for the cable system operator;
- o The cable industry has become highly concentrated, enabling the existing operators to construct barriers to entry by competing systems and resulting in a reduction in the number of media voices available to consumers; and
- o There is a substantial governmental and First Amendment interest in promoting a diversity of views provided through cable and other competing technologies. (P.L. 102-385, Sections 2(a)(2), 2(a)(4) and 2(a)(6).)

These concerns about the lack of competition were also expressed in that portion of the Act setting forth Congressional policy vis-a-vis the cable television industry. For example, it is the stated policy of Congress to promote the availability to the public of a diversity of views and information through cable television and other video distribution media; to rely on the marketplace (i.e., competition), to the maximum extent feasible, to achieve that availability; and to ensure that cable operators do not have undue market power. (Id., at Sections 2(b)(1), 2(b)(2) and 2(b)(5).)

Simply put, Congress, after extensive examination of the cable television industry, determined that competition is preferable to regulation in protecting consumers and otherwise serving the public interest. However, due to the concentration of the industry and the undue market power wielded by the incumbent operators, there has been very little head-to-head competition by two

or more cable operators serving the same territory. To stifle this undue market influence and promote competition, Congress took several actions in the Act to remove the barriers to competition that have been erected by the incumbent operators. To protect consumers until these new actions have time to achieve their intended result, the Act provides for cable regulation in the absence of effective competition.

Among the steps Congress took to remove barriers to competition are provisions prohibiting exclusive franchises in most instances, requiring fair access to programming, allowing access to home wiring by competing systems, and requiring uniform rates throughout the geographic area served by a cable operator. All of these provisions must work collectively to meaningfully encourage competition.

Each of these provisions was enacted to remove or relax a specific barrier or barriers to competition. The programming access provision was enacted to counter anti-competitive activities by programmers and incumbent cable operators which effectively denied access by competing market entrants to programming demanded by cable customers. The wiring provision was enacted because incumbent cable operators were engaging their competitors in extensive legal battles over use of home wiring in an effort to discourage competition. Incumbent systems operators were using their long-term exclusive franchises, granted in an earlier era in an effort to attract a cable operator, to preclude new entrants into their markets, hence Congress added Section 628 to the Communications Act of 1934. Likewise, Congress added a new Section 623 (d) to prevent incumbent system operators from using profits gained in one section of their service area to subsidize artificially low, anti-competitive prices in other sections of their service area to drive out competitors.

Congress heard extensive evidence of this practice during the hearings on cable industry practices which lead to the passage of the Act. One such example was given by Billy Ray, General Manager of the Glasgow, Kentucky, Electric Plant Board in testimony before the U.S. Senate Committee on Commerce, Science and Transportation. The Glasgow Electric Plant Board had established a municipally owned cable system in competition with TeleScripps. TeleScripps served three franchise areas from a headend in Horse Cave, Kentucky. Prior to

the establishment of the municipally owned system, TeleScripps charged \$14.25 per month for 28 channels to the entire area served by the headend in Horse Cave. After the Glasgow Electric Plant Board began offering 44 channels for \$13.50 per month, TeleScripps increased its basic service to 40 channels and dropped its price to \$5.95 per month -- but only to that area of its members served by the Glasgow Electric Plant Board's service system. As the municipally-owned system's service area grew, the area receiving TeleScripps new low rate grew to match it, block by block. This led to situations where a TeleScripps customer on one street was paying \$4 per month less for the same service as a TeleScripps customer only one block away. By the time the Electric Plant Board had finished constructing its cable system to serve the entire franchise area of Glasgow, TeleScripps had extended its new low price to the entire city. But if you lived one block outside of the city limits, where your sole cable operator was TeleScripps, you were charged \$4 per month more for the same service enjoyed by TeleScripps customers in town.

TeleScripps was not lowering its price to meet competition. Rather, it dropped its prices below that of its competition in hopes that the Electric Plant Board could not continue to compete at the new rates. Clearly, TeleScripps was using its considerable market power in an effort to discourage competition. Although Glasgow consumers benefitted in the short run, if TeleScripps had succeeded in forcing the Electric Plant Board to leave the market or sellout to its competitor, consumers would have suffered in the long run as competition was eliminated.

The Glasgow example is not an isolated one. The relatively small number of overbuilds -- out of more than 11,000 cable systems, only 53 communities are served in whole or in part by more than one cable operator -- are testimony to how incumbent system operators have used their market power to stymie competition. This lack of real competition is not due to a lack of interest by potential competitors -- there are 132 communities where second franchises have been awarded or are under study, and APPA's survey indicated that a similar number of its members are considering or would consider entering the cable business if barriers to competition were eliminated. However, in 62 communities where the threat of an overbuild once existed, there have been mergers between the competing systems. (Report of the Senate Committee on Commerce, Science

and Transportation on S. 12 (Senate Report 102-92), June 28, 1991, at 13). In each of these instances, the extensive bag of tricks used by incumbent cable operators to foil competition -- including artificially lowering prices to levels which cannot be matched by new entrants -- succeeded.

A. Uniform Rates Throughout A Franchise Are Not The Solution

Adopting a rule which only requires cable operators to establish uniform rates throughout a franchise area is not the solution to this problem. It would only address those situations where the incumbent cable system operator serves only a single franchise area. These one-franchise operators only have limited market power, compared to those serving multiple franchises.

A cable operator serving multiple franchises has the ability to cross-subsidize an operation in one franchise from revenues and profits generated in other franchises. In the Glasgow, Kentucky example, after the Electric Plant Board extended its service to the entire city limits, the rates charged by TeleScripps were uniform throughout its Glasgow franchise. Such an arrangement would satisfy a rule requiring uniform rate structures throughout a franchise area. But the TeleScripps customers served from the same headend located outside the Glasgow city limits did not benefit from the lower rates enjoyed by TeleScripps customers within the city limits.

In fact, TeleScripps served three franchise areas from the same headend. This enabled TeleScripps to support its artificially low prices in Glasgow from the profits made from the other communities served by its system. This additional market power gained by TeleScripps and the many other cable operators serving multiple franchises provides the "staying power" to undercut competitors' rates long enough to force a merger or market withdrawal.

A rule requiring uniform rate structures throughout only a franchise area would provide very little stimulus to competition and would affect only those cable operators with the most limited market power. For these reasons, such an approach must be rejected.

B. Requiring Uniform Rates Throughout the Area Served From A Headend Also Falls Short Of the Mark

A rule requiring cable operators to maintain a uniform rate structure throughout the area served by a headend would address more of the problem, but, still would fail to eliminate cross-subsidization and to reach those operators with the greatest market power. Many operators own multiple cable systems, each served by its own principal headend. In these situations, an operator could still afford to drop rates in one system (using the "system" here to apply to the entire area served from the principal headend) to artificially low levels for prolonged periods of time to undercut a competitor by drawing on the revenues and profits generated by the operator's other systems. This situation could occur even if the competitor serves only a small portion of the area served by the operator's headend.

The Glasgow, Kentucky example applies here also. A rule requiring a uniform rate structure throughout the area served by the principal headend would have required TeleScripps to extend its artificially low Glasgow rate to all three franchise areas served by its headend. But this still would not prevent TeleScripps from subsidizing this three-franchise system from the revenues and profits it generates from its other systems. Indeed, since the 1992 Act was passed, TeleScripps has announced it will extend its artificially low Glasgow rate to all three communities serviced from that headend.

This approach does not prevent TeleScripps from using its considerable market power to undercut the Electric Plant Board in hopes of eventually eliminating a competitor. Nor does it even address the geographical disparity of rates charged by TeleScripps. Two other franchise areas, Cave City and Horse Cave, Kentucky are served by TeleScripps from a different headend than that serving Glasgow. But TeleScripps' basic rates in these two communities is \$4.25 per month higher than what TeleScripps charges Glasgow and the two other communities served from its other headend. Yet Cave City and Horse Cave are only about ten miles from Glasgow!

Obviously, if the definition of geographic area is broadened to include the entire area served by the system's principal headend, the benefits to competition are greater and system operators' market power is curbed more than if geographic area is considered to mean only a franchise area. But implementing a rule using such a definition still falls short of resolving the problems identified by Congress and complying with the Congressional policies set forth in the 1992 Act.

C. Only The Broadest Possible Interpretation of Geographic Area Anti-Competitive Practices of Horizontally Integrated Cable Companies

In Para. 115 of the NPRM, the Commission assumes that if it interprets the term geographic area to encompass an area greater than a franchise, the region would be "limited to the contiguous area served by the system." There is nothing in the wording of Section 623 (d) or any other Section of the 1992 Act which would appear to limit the definition of geographic area. Presumably, geographic area could refer to the entire United States, its territories, and its trust possessions.

The proposal advanced by the Commission in Para. 115 to require a uniform rate structure throughout the contiguous area served by a cable system is preferable to limiting the geographic area to a franchise area. Presumably, the contiguous area could encompass more than just the area served by the headend when, as in the Glasgow example, an operator owns systems served by two or more headends where the service areas are contiguous. This definition would be preferable to limiting the geographic area to that served by a principal headend.

But once again, such a rule could still fail to curb the abuses of those operators which are more horizontally integrated. Horizontal integration gives cable operators more market power, and the most concentrated operators wield enormous market clout, as the Senate Report pointed out:

As of the end of 1990, TCI, the nation's largest cable company owned, controlled, or had investments in systems serving almost 14.3 million subscribers (about 24 percent of cable's total

subscribers). Time-Warner's cable subsidiary reaches about 6.4 million subscribers (about 12 percent). The next three largest cable systems -- Continental, Comcast, and Cox -- reach about 5.8 million subscribers (about 11 percent). The top five firms thus control almost half of the nations' subscribers. (Senate Report at 32 (footnote deleted).)

Defining geographic area to encompass the contiguous area served by a cable system will not blunt the market power of these or other horizontally integrated cable companies. Such companies -- many considerably smaller than the five cited in the Senate Report -- will continue to subsidize artificially low rates for those systems in which they face competition with revenues and profits from their other systems that are not contiguous. Only the broadest possible definition of geographic area will prevent such cross-subsidization. In the case of the industry giants, only a definition that encompasses the entire area of the United States can prevent cross-subsidization.

It will be argued by opponents of this broad definition that the 1992 Act provides another avenue to address horizontal concentration. It is true that Section 11 of the Act directs the Commission to conduct a proceeding within one year to prescribe rules and regulations establishing reasonable limits on the number of subscribers served by a cable operator. While an aggressive implementation of this Section and vigorous enforcement would curb the grossest excesses of the very biggest operators, it still would not prevent an operator from subsidizing artificially low rates in one system where competition exists with revenues and profits from other, non-contiguous systems owned by the operator. Even an operator with only two non-contiguous systems could engage in such cross-subsidization, although larger operators can afford to drop prices lower and maintain them longer than smaller systems.

IV. CONCLUSION

Congress was not hesitant in spelling out when the provisions of the 1992 Act applied to franchises, franchise areas, or franchise authorities. Reading Section 623 (d) in context with the remainder of the Act makes it clear that Congress did not mean that rate structures should be uniform throughout the


franchise served by the cable system when it used the term "geographic area". The conspicuous use of a different term in Section 623 (d) is evidence that Congress chose the phrase "geographical area" with deliberation.

Due to horizontal integration and the considerable market power wielded by incumbent cable system operators, limiting the definition of geographic area to either a franchise area, the area served by the principal headend, or the contiguous area served by a cable system will not prevent cross-subsidization to support artificially low rates in an effort to discourage competition. Although the latter definition is preferable to the former two, only the broadest possible definition of geographic area -- requiring cable operators to maintain uniform rate structures throughout all of their service areas -- will preclude these anti-competitive acts and fulfill the Congressional policies set forth in Section 2 of the 1992 Act.

WHEREFORE, THE PREMISES CONSIDERED, the American Public Power Association respectfully requests the Commission to take actions consistent with the views expressed herein.

Respectfully submitted,

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January 27, 1993